

Competition Tribunal



Tribunal de la Concurrence

Reference: *The Commissioner of Competition v Direct Energy Marketing Limited*, 2014 Comp. Trib. 17

File No.: CT-2012-003

Registry Document No.: 095

IN THE MATTER of the *Competition Act*, R.S.C. 1985, c. C-34, as amended;

AND IN THE MATTER of an application by the Commissioner of Competition pursuant to section 79 of the *Competition Act*;

AND IN THE MATTER of certain policies and procedures of Direct Energy Marketing Limited.

B E T W E E N:

The Commissioner of Competition
(applicant)

and

Direct Energy Marketing Limited
(respondent)

and

National Energy Corporation
(intervener)



Date of Hearing: October 8, 2014

Before Judicial Member: Rennie J. (Chairperson)

Date of Reasons and Order: October 17, 2014

REASONS FOR ORDER AND ORDER REGARDING SCOPE OF DISCOVERY TO BE PROVIDED BY THE COMMISSIONER OF COMPETITION AND DIRECT ENERGY

[1] The Commissioner of Competition (the “Commissioner”) moves for an order compelling Direct Energy Marketing Limited (“Direct Energy”) to answer outstanding undertakings, refusals and questions taken under advisement. He also seeks an order varying the Scheduling Order of December 9, 2013. Direct Energy also moves for an order compelling the Commissioner to answer outstanding undertakings, refusals and questions taken under advisement.

[2] At the hearing of the motions on October 8, 2014, it was clear that the parties had agreed to resolve a number of the questions in dispute. This decision only addresses the outstanding issues as raised by counsel at that hearing. Counsel have also agreed to make their respective representatives available for further questioning. Each party reserved its right to pursue an order should the recent disclosures and discoveries prove unresponsive to the questions in issue.

I. DIRECT ENERGY’S MOTION

[3] The Commissioner, in his Notice of Application, alleges that Direct Energy has engaged in a practice of anti-competitive acts by implementing exclusionary water heater return policies and procedures, including the Removal Authorization Number (“RAN”) return policy. Under the RAN return policy, customers wishing to return water heaters they are renting from Direct Energy, must first obtain a RAN from Direct Energy and then provide a written authorization to Direct Energy for the removal.

[4] The Commissioner seeks in his Notice of Application, in addition to other relief sought, an order directing Direct Energy to pay the amount of \$15,000,000 as an administrative monetary penalty (“AMP”), the maximum penalty set out in subsection 79(3.1) of the *Competition Act*, R.S.C. 1985, c. C-34.

[5] In its response, Direct Energy denies the Commissioner’s allegations and asserts that its RAN policy was a commercially reasonable response to the ongoing misleading and deceptive marketing practices by door-to-door and other marketers of water heaters employed by Direct Energy’s competitors.

[6] At the examination of the Commissioner’s representative, Direct Energy sought information about misleading conduct of its competitors in the geographic markets at issue. The

Commissioner has refused to provide this information on the basis of relevance and public interest privilege.

[7] Direct Energy submits that the timing, prevalence and location of misleading conduct by competitors constitute a necessary context to understanding its RAN policy and why it is a reasonable response to the conduct. It adds that specific and detailed information and documents related to this misleading conduct are directly relevant to its ability to defend itself against the Commissioner's application.

[8] Direct Energy further argues that the information sought is not protected by public interest privilege because Direct Energy is entitled to full disclosure of relevant information, as provided for in section 11 of the *Canadian Charter of Rights and Freedoms* (Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11), as proceedings under subsection 79(3.1) of the *Competition Act* lead to true penal consequences given the magnitude of the AMP. In the alternative, Direct Energy submits that the Commissioner's claim for a \$15 million AMP gives rise to an increased disclosure obligation on the part of the Commissioner. This, taken together with the relevance of the information sought and the fact that the identity of one of the competitors who has provided information to the Commissioner is already known, should tip the balance in Direct Energy's favour and its right to make a full answer and defence overrides the Commissioner's claim of public interest privilege.

[9] In response, the Commissioner submits that he has produced a lengthy Summary of Third Party Information (the "Summary"), as well as updated summaries, in which information about the misleading conduct of participants in the marketplace is disclosed. Further, counsel for the Commissioner argues that the Commissioner has acknowledged numerous times that he has reason to believe that the misleading conduct has and, in some instances, continues to occur within the provinces of Ontario and Quebec. In other words, at the main hearing, the Commissioner will not argue that the alleged misleading conduct is absent from the market and will confirm that the conduct has been ongoing since 2008.

[10] The Commissioner thus concludes that Direct Energy has all the necessary information it needs to advance its defense, but adds that, in any event, the information sought, such as the

precise frequency of the alleged conduct, is irrelevant to advancing a business justification argument.

[11] Direct Energy has failed to persuade me that the information sought should be disclosed. First, the Commissioner's Summary includes relevant information relating to the conduct of Direct Energy's competitors. The Commissioner has recognized that he has the obligation to continue to update the information. There are no allegations that the summaries are deficient or are improperly shielding information that would otherwise be disclosed. Direct Energy is also free to request that the Tribunal arrange for a judicial member not sitting on this case to review the documents and to ensure the adequacy and accuracy of the summaries provided.

[12] Further, Direct Energy will be able to rely on the Commissioner's concessions with respect to the existence of the alleged misleading conduct. Direct Energy will also be able to point out that the Commissioner executed search warrants in 2013 against those allegedly engaged in misleading practices and that the conduct necessitated an intervention by the Government of Ontario, through the introduction of Bill 55, the *Stronger Protection for Ontario Consumers Act, 2013*.

[13] Second, I agree with counsel for the intervener, National Energy Corporation, that the evidence that is foremost relevant in these proceedings is evidence that was available to Direct Energy during the relevant time periods; in particular, at the time that it implemented the policies at issue. Information and documents collected by the Commissioner during an investigation of the conduct of some of Direct Energy's competitors were not available to Direct Energy during the relevant time frames. Direct Energy, through its request, appears to be seeking information that would bolster its defence, including its business justification defence, although this information was not available to it at the time. The reasonableness of Direct Energy's response to the market place has to be based predominantly on its own understanding of the market place. (*Commissioner of Competition v. Canada Pipe Company Ltd.*, 2006 FCA 233, at paras 68-91, leave to appeal to SCC refused, 31637 (May 10, 2007)).

[14] While this is sufficient to dispose of this aspect of the motion, Direct Energy has not established that the public interest privilege is over-ridden by a more compelling competing interest in this case. As Madam Justice Dawson noted in *Commissioner of Competition v. Sears*

Canada Inc., 2003 Comp. Trib. 19, at para. 40, compelling circumstances are required to outweigh the public interest element (see also *Commissioner of Competition v. United Grain Growers Ltd.*, 2002 Comp. Trib. 35, at paras. 51-54). The fact that the maximum AMP under a provision is sought does not, in isolation, constitute such a compelling circumstance. It is a factor to consider in the broader context, which includes the Commissioner's disclosure so far, the marginal relevance of the information sought, the additional disclosure to be provided by the Commissioner, as well as the concessions made by the Commissioner as to the existence of the market practices which underlie the business justification. When these considerations are included in the balance, the public interest in maintaining the privilege is not outweighed.

[15] However, if, at the main hearing, the Commissioner wishes to rely upon information currently protected by public interest privilege, and have the Tribunal consider it, public interest privilege will be waived (see, e.g., *Canada (Director of Investigation and Research) v. Superior Propane Inc.* (1998), 85 C.P.R. (3d) 188, at para. 8).

[16] The right of a respondent to a fair hearing means that the respondent has the right to know the case against it and the right to have a meaningful opportunity to present evidence supporting its own case (*Commissioner of Competition v. Canada Pipe Company*, 2003 Comp. Trib. 15, at para. 53). In this case, given its unique set of facts, Direct Energy is entitled, upon receipt of the witness statements of the Commissioner, to relevant information provided by that (those) witness(es) to the Commissioner that relates to the misleading conduct of Direct Energy's competitors in the relevant markets and time periods, as circumscribed in the pleadings, notwithstanding the fact that the Commissioner does not intend to rely on that other information at the hearing. This is simply an expression of the right of Direct Energy to conduct a meaningful cross-examination.

II. THE COMMISSIONER'S MOTION

[17] In his motion, the Commissioner submitted that Direct Energy had failed to provide its position on over 60 questions taken under advisement, refused to answer approximately 30 relevant questions and refused to provide all relevant data for specific time periods. At the hearing, counsel for the Commissioner explained that Direct Energy had agreed to provide a

database and that a number of questions had been or would be answered by Direct Energy. As a result, only five questions remain in dispute.

[18] The first question relates to Question 244 which asked Direct Energy's representative, whether "Direct Energy [is] aware that [the] consent order prohibited Direct Energy, as it is now, from, among other things, preventing competitors from disconnecting and returning water heaters?" Direct Energy properly refused to answer this question as it calls for the interpretation of a legal document. Further, a party's interpretation of the document can be best inferred from the party's conduct.

[19] Question 281 does not need to be answered as the question misstated the content of the document in question.

[20] Questions 592 and 630 are no longer at issue as, at the hearing, the parties agreed that any relevant e-mail would have been part of Direct Energy's production obligation.

[21] With respect to Question 71, which asked Direct Energy's representative to provide information about the meaning of certain terms used in an agreement, a review of the transcript shows that there was no question to which an actual refusal was given on the record.

III. COSTS

[22] The parties have provided to each other information after the filing of their respective motions and this shows, in my view, that at least each motion was partially founded. Success on the remaining issues was divided. Costs will be in the cause.

DATED at Ottawa, this 17th day of October, 2014.

SIGNED on behalf of the Tribunal by the Chairperson.

(s) Donald J. Rennie

APPEARANCES

For the applicant:

The Commissioner of Competition

Jonathan Hood

For the respondent:

Direct Energy Marketing Limited

Donald B. Houston

For the intervener:

National Energy Corporation

Adam Fanaki